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In The

Supreme Court of the United States

October Term, 1978

No. 78-261

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL, MICHAEL FAGAN, and I. WALTON BADER,

Petitioners,

vs.

TOUCHE ROSS & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL, MICHAEL FAGAN, and I. WALTON BADER,

Petitioners,

vs.

TOUCHE ROSS & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above-named petitioners, hereby petition this Court, for a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit which dismissed the complaint filed by the petitioners IIPL, Randolph and Fagan and imposed attorneys' fees and expenses of over $8,000 upon petitioners IIPL and petitioner Bader, their attorney. The court further dismissed the complaint against petitioner Michael (a non-party).

The dismissal was made, and the fine imposed, by reason of the findings of the district court that the petitioners had failed to comply with an order of the court requiring the filing of further answers to interrogatories.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, for which review is sought herein, was not yet officially reported. A prior opinion of the Court of Appeals, dismissing a prior appeal as premature, was reported in 542 F.2d 156. These opinions are annexed to this petition as the appendix. There were prior opinions of the district court, none of which were reported either officially or unofficially. These opinions are also annexed in the appendix.

The original determination of the United States District Court for the Southern District of New York was made on January 9th, 1976. Thereafter an appeal was taken from said order to the United States Court of Appeals for the Second Circuit which was dismissed on September 7, 1976 as taken from a non-appealable order. On December 8th, 1976, the district court vacated a "so ordered" provision annexed to notices of voluntary dismissal previously filed in this case. On December 28th, 1976 the district court denied a motion made by the petitioners under Rule 60(b) with respect to the original determination of January 9th, 1976. On March 4th, 1977 the district court awarded attorneys' fees and expenses of $8,074.38 to respondent to be paid by petitioners IIPL and Bader.

All of the prior orders and memoranda of the district court are annexed in the appendix, *infra*.

JURISDICTION

Jurisdiction of this Court is invoked as follows:

The judgment of the Court of Appeals against which this petition is filed was entered on April 4th, 1978.

Within the time permitted for the filing of a petition for rehearing such petition was duly filed with the United States Court of Appeals for the Second Circuit. This petition was denied on June 8th, 1978 (which also denied a companion application made for *en banc* review of the decision of April 4th, 1978). No extension of time to file a petition for a writ of certiorari has been obtained and this petition is filed within 90 days from the date of the denial of said petition for rehearing.

This Court obtains jurisdiction to grant the petition sought herein pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The Court of Appeals has decided an important question of federal law (*i.e.*, the applicability of Rule 61 FRCP to informal interrogatory answers) which is believed to be in conflict with the intent of such rule and which question has not been heretofore settled, and should be settled, by this Court. In brief, the Court of Appeals has found that the few days' delay in compliance with the order of the district court was of no moment in the litigation. The facts are further uncontroverted that, within the time for compliance with the order of the district court, *informal* interrogatory answers were served which gave the adverse party all of the *information* that it required. Since Rule 61 FRCP provides that "*. . . the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*" the district court was not permitted to apply Rule 37 sanctions to the petitioners under the facts of this case.

2. The Court of Appeals for the Second Circuit has rendered a decision which is in conflict with decisional law of other courts of appeals. In particular, in its failure to apply the provisions of Rule 61 to the facts in this case, it is in conflict, for example, with the decision of the Tenth Circuit in *Carter Electric Company v. Travelers' Indemnity Company*, 382 F.2d 567 (1967) where even a *failure* to obtain further answers to interrogatories by an adverse party was considered harmless error where the information was supplied through other sources. An earlier case which similarly interpreted the forerunner of Rule 61 FRCP, is *Mass. Bonding & Insurance Co. v. Concrete Steel Bridge Co.*, 37 F.2d 695 (1930).

3. The Court of Appeals for the Second Circuit, in affirming the determination of the district judge in this matter, has so far departed from the accepted and usual course of judicial proceedings, as to call for this Court's powers of supervision. Some of the errors involved are as follows:

a. Permitting the district judge to make factual findings relating to purported "testimony" given before him by an attorney relating to factual matters, where such "testimony" involved mere oral argument relating to a motion by such attorney and no stenographic record of such purported "testimony" was made anywhere, and by permitting the use of the confidential notes of the district judge as to what transpired at such argument thus making said district judge a witness in violation of either 28 U.S.C. §455 or Rule 605 of the Federal Rules of Evidence.

b. By the court failing to inform the petitioner Bader, that it was personally acquainted with the attorney for Touche Ross, the respondent herein, and that said attorney was also a member of the Judiciary Committee of the New York City Bar Association who passed on the qualifications of the said district judge for appointment to the bench (said appearance taking place less than a year before proceedings under Rule 37 were commenced before such district judge).

c. By the attorney for the respondent failing to disclose to the petitioner Bader his prior relationships with the district judge as set forth in paragraph "b" hereinabove prior to the institution of Rule 37 proceedings by such district judge.

d. By the Court of Appeals' failing to take into consideration false affidavits filed by the respondent's attorney Eno in this proceeding and, in effect, "rewarding" the respondent despite the improper conduct involved.

4. The Court of Appeals is believed to have misinterpreted the decision of this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). This decision, by a divided Supreme Court, holds that the discretion of a district court to require strict compliance with time schedules for discovery matters will ordinarily not be interfered with even though the appellate court may have differing views on the matter. The Court may wish to clarify this determination, particularly in the case at bar where, while the interrogatory answers originally served were informal, they were sufficiently informative to give the adverse party all of the information that it required. In such case, it is submitted the imposition of Rule 37 sanctions by the district court was unwarranted or an abuse of discretion, and is in conflict with the above decision.

5. The Court of Appeals has decided this case in conflict with other decisions of the same court. By prior decisional law, the Court of Appeals has refrained from comment on the conduct of an attorney, leaving such matters to the appropriate disciplinary authorities of the Bar. Such decisions are *W.T. Grant v. Haines*, 531 F.2d 671 (2 Cir. 1976) and *Korn v. Franchard Corporation*, 456 F.2d 1206 (2 Cir. 1972).

6. The Court of Appeals has further decided this case in conflict with its own prior decisions in view of its normal holding that interrogatory irregularity will not be grounds for dismissal, or grounds for other sanctions, unless the default was

wilful. Such cases are *Israel Aircraft Industries, Ltd. v. Standard Precision*, 559 F.2d 203 (2 Cir. 1977); *Flaks v. Koegel*, 594 F.2d 702 (2 Cir. 1974) and the prior decision of this Court in *Societe Internationale v. Rogers*, 357 U.S. 197. It is noted that *Israel Aircraft* was decided subsequent to *National Hockey League* so that it is important for this Court to properly decide the federal question involved.

7. The Court of Appeals has decided an important question relating to federal civil procedure that is believed to conflict with the proper interpretation of the federal rules. This relates to the filing of a notice of voluntary dismissal in connection with a lawsuit. The Court of Appeals, in affirming the district judge, has decided the question in conflict with decisional law of other circuits by, in effect, requiring permission of the court to so do even though an answer has not been filed in the case, which is in conflict with the provisions of Rule 41(a) FRCP, as well as other decisional law. The Supreme Court, in an effort to avoid congestion of court dockets, should take this case to authoritatively decide this question.

8. The imposition of a penalty upon a plaintff, and upon his attorney, pursuant to Rule 37 FRCP is, in effect, a quasi-criminal proceeding. This is particularly true, in this case, in view of the recommendation by the district judge for disciplinary action against such attorney. In such case, constitutional requirements mandate a jury trial. A jury trial was refused in the case at bar. This is in conflict with prior decisions of this Court, in particular *Bloom v. Illinois*, 391 U.S. 194 (actions involving criminal contempt), and *Curtis v. Loether*, 415 U.S. 189 (penalties based upon statutes). The matter has also been commented upon in a recent article in the Harvard Law Review, *cf., Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. Law Rev. 1033 (1952) as follows:

> ". . . A party, such as the respondent in *National Hockey League*, who is willing to cure his previous discovery default and pay the expenses of the discovering party may argue that he must be accorded criminal process before the imposition of any sanction for the purpose of deterrence . . . ."

It is noted, of course, that this Court in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) has held that a party must be granted criminal process when confronted with a punitive sanction.

9. By reason of the facts in this case, the conduct of the petitioner Bader, criticized by the Court of Appeals (who also criticized the conduct of respondent's attorney) was *mandated* by the facts involved. His conduct should be commended rather than criticized. Where this Court has a matter before it where attorney's conduct is considered, such facts are grounds for the grant of a certiorari petition. See, *e.g., Sperry v. State of Florida*, 373 U.S. 379, 83 Sup. Ct. 1322, 10 L. Ed. 2d 428 (1963); *Theard v. United States*, 353 U.S. 278, 77 Sup. Ct. 1274, 1 L. Ed. 2d 1342 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 Sup. Ct. 752, 1 L. Ed. 2d 796 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 Sup. Ct. 722, 1 L. Ed. 2d 810 (1957); *Bates v. State Bar of Arizona*, ____ U.S. ____.

10. This case also involves an important question of federal-state interaction. Under state law the copies of interrogatory answers would have been deemed properly verified. Rule 33 merely mandates that answers to interrogatories be served under oath, and signed by the party making them. The sufficiency of the *verification of interrogatory answers* is thus determined under *state law*. Thus, where this is the sole ground for rejection of such answers as untimely the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 applies and the determination of the Court of Appeals should be reversed. However, this involves an important question of law which should be finally settled by this Court.

11. This case also involves an important question of federal law where, if the determination of the Court of Appeals can be explained, seems to involve a conflict between circuits. Since the Court of Appeals sustained the dismissal of the complaint against a non-party (Gary Michael) the dismissal could only be sustained on the ground that such party could not be dropped without a specific order of the court under Rule 21 (even though the court did grant leave to amend under Rule 15 to the plaintiffs). This is in conflict with the decision of the same court in *Kerr de Compagne v. Ultramar,* 250 F.2d 860 (2 Cir. 1958) and is in conflict with a similar decision of the Fifth Circuit in *McLellan v. Mississippi Power & Light Co.,* 526 F.2d 870 (5 Cir. 1976).

The Court of Appeals thus seems to be following district court decisions such as *Gordon v. Lipoff,* 320 F. Supp. 905 (W.D. Mo. 1970); *Rekweg v. Federal Mutual Insurance Company,* 27 F.R.D. 431 (N.D. Ind. 1961) or *Zarate v. State Dept. of Health, etc.,* 347 Fed. Supp. 1004 (S.D. Fla. 1971), *aff'd,* 407 U.S. 918 (1972).

This Court should determine, as a matter of law, whether the permission of an amendment under Rule 15 FRCP permits the dropping of a party without a separate motion being made under Rule 21.

Quite obviously, if the Court should sustain the dropping of a party where Rule 15 amendment is permitted then the decision of the Court of Appeals is clearly wrong since a non-party cannot be penalized for failing to answer interrogatories. See, *e.g., Ju Shu Cheung v. Dulles,* 16 F.R.D. 550 (D.C. Mass. 1954); *Leonia Amusement Corp. v. Loews, Inc.,* 21 F.R.S. 2d 467 (D.C. S.D.N.Y. 1955); *Holland v. Minneapolis Honeywell Regulator Company,* 28 F.R.D. 595 (D.C. D.C. 1961); *Steelman v. U.S. F. & G. Co.,* 35 F.R.D. 120 (D.C. Mo. 1964) and *Wainwright v. Kraftco Corp.,* 54 F.R.D. 532 (D.C. Ga. 1972).

12. The district court, and the Court of Appeals in affirming the district court, failed to follow appropriate standards of due process which requires the intervention and supervision of this Court. Thus, in imposing penalties of over $8,000 on the petitioner IIPL and its attorney Bader, for a matter which the Court of Appeals itself held was of no moment in the litigation, the court refused a hearing to the petitioners on this matter but decided the question *ex parte* on the basis of conflicting affidavits. Such failure of due process warrants intervention by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution, Fifth Amendment (see Appendix).

2. United States Constitution, Sixth Amendment (see Appendix).

3. United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved."

4. Rule 15 FRCP (see Appendix).

5. Rule 33 FRCP (see Appendix).

6. Rule 37 FRCP (see Appendix).

7. Rule 41 FRCP (see Appendix).

8. Rule 61 FRCP reading in part as follows:

". . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioners will set forth, in this section of the petition, only the uncontroverted facts. There were, of course, in this proceeding, various disputed facts which were found by the court and which were sharply contested.

At the outset the Court is advised, and the Court of Appeals so found in footnote 5 of its opinion, that this action involved a "personal feud" between opposing counsel. This "feud" was occasioned, in the petitioner's opinion, by reason of various complaints made by petitioner's counsel to the Securities and Exchange Commission relating to various audits conducted by Touche Ross which resulted in substantial stockholder losses. The Securities, and Exchange Commission has commenced disciplinary proceedings against Touche Ross which are pending under SEC Docket Number 3-5075. In these proceedings petitioner's counsel has moved to intervene and to broaden the proceedings to include audits made by Touche Ross in other public corporations such as, for example, Zale Corporation.

This action was one of seven suits brought against respondent by reason of its audit information relating to Teleprompter Corp. which resulted in stockholder losses. The actions were consolidated on November 15th, 1974 and class certification was granted, in connection with the other six pending actions, on September 23rd, 1975. A settlement has been proposed in the consolidated action which awaits action by the Court. In this settlement, as pointed out by the Court of Appeals, the petitioners will participate as class members.

The action involved in this petition was commenced on September 26th, 1973 (JA17) by the filing of a complaint naming petitioners IIPL, Randolph, Gary Michael and Michael Fagan as class representatives of a stockholder class of Teleprompter Corp. The complaint was dismissed by District Judge Griesa with leave to amend on December 11th, 1973. An amended complaint, withdrawing the name of Gary Michael was served on January 4, 1974 (JA386). Thereafter answers to outstanding interrogatories of the respondent (served in connection with the original dismissed complaint) were answered on July 11th, 1974 (JA429).

A motion was made by the respondent before District Judge Owen (to whom the case had now been assigned) to require petitioners to supply further answers to interrogatories. The motion was granted by District Judge Owen on August 16th, 1974 giving petitioners 20 days from that date to comply therewith (JA454).

On August 15th, 1974 (a day before the decision of the district court) petitioners' attorney Bader wrote to petitioners Randolph (a California resident), Fagan (a Connecticut resident) and Gary Michael (a Vermont resident) requesting the information necessary to comply with the order of the Court (JA467, 468). These requests were answered about August 29th, 1974. These answers, of course, are *holographic* answers and, it is to be noted, that the answers of Gary Michael were actually signed by him (see JA468). These answers were obviously made under oath even though not formally verified. Gary Michael was not a plaintiff in the case at that time, but in view of his last name being the same as the first name of Michael Fagan who was a plaintiff in the action there was understandable confusion on this point.

Promptly upon receipt of the holographic answers of the petitioners Randolph, Gary Michael and Michael Fagan draft copies of proposed answers were mailed to the above parties. On September 3rd, 1974 petitioner Randolph signed the draft

answers and mailed them to petitioner's attorney. On August 30th, 1974 petitioner Fagan signed the draft answers and mailed them to petitioner's attorney. On September 5th, 1974 petitioner IIPL (through its Secretary Sands) signed the draft answers to interrogatories (and also signed one copy of these answers).

The procedural problems, which, while clearly of no moment in the litigation, now took place and occasioned the entire problem now before this Court. Petitioners claim that the petitioner IIPL's secretary Sands, inadvertently mailed draft copies of interrogatory answers of the petitioners Randolph, Michael and Fagan, to the attorneys for the respondent. That these copies were, of course, drafts, is shown by the copies themselves. It is also uncontroverted that, almost immediately thereafter, petitioner Bader telephoned the attorneys for the respondent and informed him that copies of the original answers would be sent in a few days. However, the court found, as a fact, that these draft copies were mailed in an attempt to mislead counsel for the respondent that such answers were, in fact, timely filed.

Under the uncontroverted facts, at the time of the mailing of the draft answers, they had been, in fact, signed by Randolph and signed by Fagan. They had not yet been signed by Michael (who was a non-party) and, while the court found that they had not been signed by IIPL's secretary Sands, the evidence to support this fact is non-existent. In any event, upon request of respondent's attorney, the original signed answers of IIPL (duly notarized) and of Randolph were exhibited to the respondent's attorney at the time requested by him. Thus any irregularities involved were, of course, waived. In addition, with respect to the Fagan answers (which had been lost in the mail) there was exhibition of the holographic answers to the respondent's attorney as well as exhibition of the Fagan holographic answers [see JA467 (as to Fagan) and JA468 (as to Michael).]

Prior to the motion made by the respondent under Rule 37 there had been full compliance with the court's order and the

decision of the Court of Appeals (indicating that a delay of only a few days was involved) supports this point.

Also prior to the argument of the Rule 37 motion before the court, namely on September 16, 1974, Gary Michael did send signed interrogatory answers to petitioner Bader and subsequently ratified the answers originally sent. There was a slight variation between the draft answers and the answers served September 5th, 1974 in that the residence address of Gary Michael was different (he had moved) and he gave the "trade date" of the purchases of Teleprompter stock, March 10th, 1972 rather than the "settlement date" of April 1, 1972. (The interrogatory requested the "purchase date" of the stock and either date would have been correct.)

In any event Gary Michael ratified the original draft answers in an affidavit subsequently filed in this case (JA745-746).

Also, in this case, there are powers of attorney by the petitioners IIPL, Randolph and Fagan giving petitioner Bader full authority to sign interrogatory answers (see JA768, 769, 771, 772, 901, 902, 903).

Also, under New York state law, the signature of an attorney representing non-resident clients is fully sufficient as a verification and such signature, under New York state law, need not be formally verified before a notary public.

Thus, within the stricture of Rule 61 FRCP the order of the district court was complied with in the time allowed. Nevertheless the district judge, after a hearing based on improper notice of the subject matter thereof, dismissed the complaint and awarded over $8,000 in attorneys' fees to the respondent. The award was made without any opportunity for the petitioner to cross-examine the attorney involved to contest the statements made in the moving affidavit for fees.

There are other matters in connection with this petition to which the Court should be aware. The respondent's attorney Eno made a number of false affidavits in this proceeding. The first affidavit, admittedly false, stated that the answers of the IIPL and the petitioners Randolph, Michael and Fagan arrived in the same envelope (see JA470, *et seq.).* This was admitted by Eno at the "tail end" of the hearings before the court.

The second affidavit appears in the record at JA477 and alleges that the petitioner Bader deliberately misled not only the attorney for the respondent but other attorneys appearing in the case as well. However on examination at the court hearing, said attorney admitted that he had not contacted any of the other defendants' attorneys in connection with this matter. Parenthetically none of the other defendants' attorneys have raised any question with respect to the interrogatory answers involved.

The third affidavit is both false and misleading. It appears on pages 625-627 of the Joint Appendix. It is false in stating that petitioner Bader, in the first application under Rule 37 before the district judge, did not say that Sands (the secretary of petitioner IIPL) was in his office on September 9th, 1974 although this statement appears in the court's own notes. It is misleading in stating that a letter deposited in a post office box in San Diego, California on September 3rd 1974 after 5 P.M. would not reach New York on September 5th, 1974. The affidavit to which this was a reply stated that the letter was mailed in *the post office* in San Diego, California and *before 5 P.M.*

It is therefore submitted that, under the provisions of Rule 61 FRCP, the court's order relating to interrogatory answers was complied with within the time required by the court and the imposition of Rule 37 sanction was inappropriate.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Second Circuit has decided the applicability of Rule 61 FRCP which is an important question of federal law in a manner which is believed to be in conflict with the intent of such rule and which question should be settled by this Court.

Since the departure of the courts from the strict technical standards of compliance with forms of action and other formal matters, procedural codes in all jurisdiction contain provisions to the effect that any technical non-compliance with rules and regulations that do not affect the merits of an action must be disregarded. The applicable federal provision is Rule 61 FRCP which reads in part as follows:

> ". . . The Court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. . . ."

The Court of Appeals, in the case at bar, specifically held that the "few days delay" in the submission of interrogatory answers, was of no moment in this litigation.

Rule 61, on the other hand, was not well drafted. The preamble to the quoted language refers to *appellate proceedings* and the doctrine of "harmless error." Rule 61 more properly should have been drafted in two parts with the quoted section of Rule 61 set forth in a separate Rule 61(b).

However the intention of Rule 61 (which replaced a more specific judicial code provision) clearly indicates the proper import of the rule.

In addition, Rule 33, relating to the verification of interrogatory answers, merely states that the answers are to be made under oath and to be signed by the party making them. The sufficiency of the verification of such answers is, of course, determined under state law. Thus, for example, under New York state law, mere signing of interrogatory answers by an attorney "under penalties of perjury" constitutes good verification of such answers. Under New York state law the omission of a "jurat" from verified documents does not render the verification void. (See, *e.g., Halpern v. State Furniture Co., Inc.*, 61 N.Y.S. 2d 618; *People ex rel. Fifth Avenue & 37th Street Corp. v. Miller*, 261 App. Div. 550; *People v. Miller*, 282 N.Y. 5 and *Federal National Mortgage Association v. Graham*, 324 N.Y.S. 2d 827.) Furthermore, an attorney can sign for non-resident parties.

Even under federal law, where an association is required to verify interrogatory answers, the signature of its *attorney* is sufficient. (See, *e.g., Fernandez v. United Fruit Company*, 50 F.R.D. 82, 86 (1970); *Segarra v. Waterman Steamship Corp.*, 41 F.R.D. 245, 248 (1969); *Jones v. Goldstein*, 41 F.R.D. 271, 274; *Holler v. General Motors Corp.*, 3 F.R.D. 296 and *Harbor Shrimp Co., Inc. v. Puritan Marine Underwriters, Inc.*, 21 Fed. Rules Serv. 2d 618. See also Moore, 4 *Federal Practice* 33.07.)

Even the use of unverified interrogatory answers as response to a demand, provided that verification is subsequently provided, is authorized under federal rules, see, *e.g., Cabales v. United States*, 51 F.R.D. 498 (D.C. S.D.N.Y. 1970).

Finally, of course, a party may verify answers through one having an authorized power of attorney. Under New York state law, such verification is permissible. See New York General Obligations Law, Section 5-1502H and *Torre v. Grasso*, 11 Misc. 2d 275 (1958). Such verification was even made in an action pending in the court from which this proceeding originated. See *Cuban Cigar Brands N.V. v. Upmann International, Inc.*, Docket 77 Civil 345 (D.C. S.D.N.Y.).

Under the facts, as conceded in this case, the answers given to the interrogatories involved were entirely correct. The sole question involved related to the *formalities* of the answers. No answers could have been required from Gary Michael because he was not a plaintiff at the time that the order requiring such answers was made. The answers of the plaintiff IIPL were informal only by reason of the omission of the "jurat" which is not a formal requirement under New York state law. Furthermore, these answers, even under federal law could have been signed (without notarization) by the petitioner Bader. With respect to the answers of the remaining parties Randolph and Fagan the record is uncontroverted that these answers were *signed and verified* at the time required by the order of the court.

Indeed, even if the answers involved had been submitted in the form of unverified drafts which had only been corrected later, it is submitted that Rule 61 would still preclude the granting of sanctions for non-compliance absent a showing of prejudice by the adverse party.

The facts involved in this case do not show any *wilful* non-compliance with the order of the court but rather a desperate attempt to insure that the court's order was complied with. It is submitted that the Court in *National Hockey League, supra*, did not intend to give a district court complete discretion to dismiss an action and impose draconian penalties upon parties merely for *technical*, non-prejudicial, non-compliance with court orders where an effort was made to comply with the order and the order was substantially complied with.

Were this Court not to grant certiorari in this case parties, who for technical reasons did not *strictly* comply with all formal requirements of interrogatory answers, would be precluded from relief if met with a "technical" district judge. Rule 61 would become a "dead letter" and the federal courts would be returned to the legal system existing at the time of

Blackstone. This flies in the face of present precedent and is a matter of great public interest.

All agencies of the Government are, of course, attempting to improve the administration of justice. For example, in a speech delivered by Attorney General Bell before the United States Trademark Association in West Palm Beach on May 11th, 1978 he had this to say:

> ". . . We concentrated on improving the delivery of justice in the hope of making 'equal justice under law' a meaningful promise in the sense that justice will be available to all on a prompt and inexpensive basis. . . ."

In another speech delivered on May 19th, 1978 before the American Law Institute at the Hotel Mayflower in Washington D.C., Attorney General Bell stated the following:

> ". . . We are seeking to reduce the abuses of pretrial discovery in the Federal Courts. . . .
>
> This is clearly an area in which the bar can make considerable contributions not only through creative thinking about reform but also by restraint in the use of the existing discovery procedures. . . ."

Dean Pound, as early as 1906, delivered a speech relating to the causes of the popular dissatisfaction with the administration of justice. The overly technical rules of the courts, even at that time, were subjected to severe criticism.

Further illustrative of the popular view of our legal system is a recent article in *Dun's Review* of March 1978 entitled *Tales from Jim Boren's Bureaucratic Woods*. As the author states:

> ". . . Rare is the top executive who cannot relate a painfully funny account of bureaucratic harassment. . . ."

Criticism of overly technical rules of procedure has been manifest in all branches of government. Thus, early this year President Carter criticized technical rules of law and procedure which caused a denial of justice.

As late as August 7th, 1978, Senator Kennedy, in a speech to the American Bar Association Convention in New York City stated that the United States is over-lawed and over-lawyered.

Should the Judicial Branch of this Government sustain the decision of the Court of Appeals for the Second Circuit by denying the petition for a writ of certiorari sought herein it can be confidently expected that legislation will be passed sharply limiting the powers of the court under FRCP 37 and a statutory enactment of the *mandatory* provisions of Rule 61 with respect to technical failures which prejudiced no one.

Finally, of course, the public interest in this case is manifest. The Court, in this case, has a clear opportunity to reiterate the provisions of Rule 61 FRCP and inform the lower courts, once and for all, that *technical* non-compliance with rules which work no substantial prejudice *shall be disregarded* and that this language is *mandatory*.

II.

The decision of the Court of Appeals so far departed from the accepted and usual course of judicial proceedings so as to call for this Court's powers of supervision.

The petitioners submit that if the Court accepts the argument set forth under "Point I", hereinabove, then this point becomes unimportant. However, if the Court holds that,

the order of the district court could, under certain circumstances have been made, then, it is submitted that the procedural irregularities in this case preclude the granting of the relief given to the respondent.

The claims of procedural irregularities were duly raised before the district court and before the Court of Appeals but were ignored by both courts.

In a recent article in 91 Harvard Law Review 1033 entitled *the Emerging Deterrence Orientation in the Imposition of Discovery Sanctions* the author points out on page 1052 that under *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) that a party charged with wilful violation of a court order could demand governmental prosecution, actual notice that a punitive sanction may be imposed, proof of wilful failure beyond a reasonable doubt, and the privilege against self incrimination. In the case at Bar, in view of the district judge's recommendation of disciplinary action against the attorney involved, the proceedings are clearly quasi-criminal under the decisions of this Court in *In re Ruffalo*, 390 U.S. 544, 551; *Theard v. United States*, 354 U.S. 278; *Cole v. Arkansas*, 33 U.S. 196; *In re Jones*, 506 F.2d 527 and *Burkett v. Chandler*, 505 F.2d 217 and the right of jury trial under the Sixth and Seventh Amendments to the Constitution of the United States is mandatory.

At the time of the first argument of the Rule 37 application before the district judge, the record is undisputed that there was no stenographic record taken of what was said at that time. The district judge, for his own confidential use, took notes of what purportedly was said during these proceedings and counsel for the respondent (who later admitted the filing of at least one false affidavit) memorialized what he believed was said *several hours after the statements were purportedly made and from memory.* The court's notes and the notes of the respondent's attorney are at variance.

Utilizing both his notes and the respondent's notes as a basis of what was said by petitioner Bader at such hearing, the district judge, finding that these purported statements were at variance with testimony later given under oath by petitioner Bader, accused him of making false statements and giving false testimony.

To permit such procedural irregularities to stand would permit the conversion of federal courts into kangaroo courts. In any case where a stenographic record of proceedings is not taken (as is usually the case on arguments of motions, for example) a court (or an adverse party) could claim that various statements were made by an attorney, even if not made, that these statements would have the force of sworn testimony, and any statements later made claimed to be inconsistent therewith could be held to be false.

To avoid such questions the Congress first promulgated 28 U.S.C. §455 providing that a judge, who becomes a witness in any proceeding, is automatically disqualified from presiding. This provision is now contained in Rule 605 of the Federal Rule of Evidence.

The use by a court of its notes (for other than its own personal use which does not become a part of any evidentiary record upon which the court's decision is based) is not permitted even where the notes are of a deceased judge. See, *e.g., Deep Sea Tankers v. The Long Branch*, 242 F.2d 433 (2 Cir.) where the court said:

> " . . . We hold that Judge Goddard's notes are not part of 'the record made at the trial' of the case before him. . . ."

The use by an adverse attorney of his own personal notes of what transpired at a hearing where no stenographic record has

been taken when he becomes a subsequent witness, is not only improper as a *due process* violation but subjects the attorney to disciplinary action for violation of DR-5-102 of the Judiciary Law of the State of New York (also a part of the Code of Professional Responsibility of Attorneys) which reads in part as follows:

> ". . . If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation. . . ."

The second error in the proceedings below involves the failure of the district judge and thereafter the adverse attorney to inform the petitioners' attorney that the district judge and the adverse attorney were personally acquainted and, in addition, less than a year previously, the qualifications of the district judge for appointment to his position had been passed upon by the respondent's attorney in connection with his duties as a member of the Judiciary Committee of the Association of the Bar of the City of New York.

It is to be noted that the raising of this point does not require that the district judge should be automatically recused by reason of the above facts. The problem is much more serious. It is important that the public at large have confidence in the impartiality and fairness of the judiciary, particularly where the district judge has wide discretionary powers. Thus in *Winters v. Travia,* 495 F.2d 839 (2 Cir. 1974) the Court of Appeals pointed out, in suggesting recusal of Judge Travia, that it is not only important for a litigant to receive justice in the courts but that he believe that he is so receiving it.

Similarly in *In re Continental Vending Machine Company,*

543 F.2d 986 (2 Cir. 1976), the Court of Appeals suggested to Judge Mishler that he recuse himself even though there was no ground for doing so.

The public attitude on this question is also significant. In the August 1st, 1977 issue of *U.S. News and World Report,* page 68, the following statement was made:

> ". . . society had demanded — and properly should demand — of its public servants conduct above the *appearance* of wrongdoing. That precept dates from the days of Socrates to the time of Caesar's wife until the present. . . ." (emphasis supplied).

Whether a particular fact pattern of alleged bias and prejudice of a district judge mandates his recusal must be determined by the facts of the particular case. The district judge, at least in the first instance, must make the initial determination. There are concededly facts and circumstances wherein a district judge may not desire to recuse himself and where such determination is proper. However unless there is *disclosure* of recusable facts there is no possibility of a party to even seek recusal unless he has the opportunity to make an investigation on his own behalf. Thus, in order to have confidence in the judiciary, there must be a policy on the part of the courts to require a judge to make disclosure of all facts, even if not strict grounds for recusal, that would have any bearing, no matter how remote, on his impartiality.

The Supreme Court now has the opportunity, by granting the present petition, to set forth standards of conduct to which district judges will be required to adhere. It will aid in informing district judges when *disclosure* of possible bars to their complete impartiality is required and will avoid the necessity for attorneys for litigants to investigate these facts on their own.

By reason of the behavior of a small minority of members of the judicial branch, there has been criticism levelled at the judiciary. Thus, in the May 1978 issue of *Judicature*, an article entitled *Holding Federal Judges Accountable* appears on page 442. If this Court does not accept this case, and define the limits of disclosure of the federal judiciary of possible conflicts of interest in matters before them, pressure for statutory or constitutional changes with respect to appointment, tenure and disclosure requirements of federal judges will increase.

Finally, on this point, it is noted that, where a practicing attorney does not wish to try a case before a particular judge (for whatever reason) he generally has the option of demanding a jury trial. At least in the federal system a denial of a right of trial by jury is mandamusable. See, *e.g., Davis v. Board of School Commissioner of Mobile County,* 517 F.2d 1044 (1975). Thus, in the case at Bar, had the district judge made the disclosure of facts discovered subsequently, and had he, *at that time,* declined to recuse himself, a prompt mandamus application would have been made to the Court of Appeals. The failure to so disclose thus severely prejudiced the petitioners. In fairness to the district judge it is believed that had the request for his recusal been made *prior* to the rendering of the decision complained of herein, petitioners believe that he would have so recused himself. After making a decision which petitioners believed to be improper, for the district judge then to have recused himself, would have been a confession of error which the district judge quite obviously could not have made.

It is further submitted that the respondent's attorney had a similar obligation to disclose his prior relationships with the district judge prior to proceeding before him in a matter wherein he knew that he was going to be a witness. To "reward" such behavior by granting dismissal of the complaint and a draconian fee award is believed to be highly improper.

Finally, of course, the clear improper conduct of the respondent's attorney in connection with the false affidavits, and

misleading statement previously referred to by petitioner, together with the criticism of his conduct by the Court of Appeals for the Second Circuit, should not permit him to be "rewarded" by the district court.

III.

Rule 37 sanctions were inappropriate because there was not wilful non-compliance with a discovery order of the court.

Prior to the decision of this Court in *National Hockey League, supra,* the law was clear that no sanctions for violation of discovery orders would be imposed unless the failure to comply with the order was *wilful.* See, *e.g., Flaks v. Koegel,* 594 F.2d 702, 709 (2 Cir. 1974); *Societe Internationale v. Rogers,* 357 U.S. 197; *GFI Computer Industries, Inc. v. Fry,* 476 F.2d 1; *Grace v. Fisher,* 355 F.2d 21; *SEC v. Research Automation Corp.,* 521 F.2d 585, 588 (2 Cir. 1975); *Independent Productions Corp. v. Loews, Inc.,* 283 F.2d 730, 733; *Fox v. Studebaker-Worthington, Inc.,* 516 F.2d 989, 995 (8 Cir. 1975).

National Hockey League, supra, was decided by this Court in 1976 (long after the incidents which caused the proceedings here). Thus petitioners could not be held to an *ex post facto* standard. Even after the decision in *National Hockey League* the Second Circuit in *Israel Aircraft Industries v. Standard Precision, supra,* vacated a dismissal of a complaint under circumstances far more egregious than those involved in the present case.

In the case at Bar, however, the Second Circuit has apparently interpreted *National Hockey League* to mean that a district court has absolute discretion to impose any Rule 37 sanction that it pleases, even if there is merely a *technical* non-compliance with the order involved, regardless of prejudice to the adverse party and even if the failure to comply was due to circumstances completely beyond the control of the party against whom sanctions are imposed.

Under the uncontroverted facts involved in the case at Bar the petitioners' attorney had holographic answers to interrogatories in his possession at the time required for service by the order of the court. Assuming, *arguendo*, that merely *draft* answers were served within the time required for compliance (but which were followed up promptly, *i.e.*, within a few days as found by the Court of Appeals), by formally correct answers, it is submitted that this Court never intended *National Hockey League* to require a dismissal of a complaint and imposition of monetary sanctions under these circumstances. Rule 37 sanctions are obviously mandated only if there is a *wilful* failure to comply with an order of the court and this Court should grant the present petition to set the matter right.

IV.

The district court had no power to impose Rule 37 sanctions because prior to the date of their imposition Rule 41(a) notices of voluntary dismissal were filed by the plaintiffs.

It is undisputed that, prior to the imposition of Rule 37 sanctions by the court, the plaintiffs had filed notices of voluntary dismissal under Rule 41(a) FRCP.

It is further undisputed that no answer or motion for summary judgment had been filed in the case prior to the filing of these notices.

The Court of Appeals, in its first opinion, questioned the jurisdiction of the district court because, while the suit was brought as a class action, and Rule 23 prevents dismissal or compromise of a class action without approval of the court, the court had "so ordered" these notices of voluntary dismissal.

When the case came before the Court of Appeals for the second time, the district judge vacated his "so ordered" imprimatur upon these notices. The Court of Appeals, believing

that the district judge had made an error in "so ordering" the notices, permitted him to correct his error.

In doing so, however, the Court of Appeals ignored two controlling precedents of this Court which hold than an action, brought as a class action, does not become subject to Rule 23 limitations until certification of the class.

The cases are *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128, 95 Sup. Ct. 848, 850 (1975); and *Baxter v. Palmigiano*, ___U.S. ___, 95 Sup. Ct. 1551, 1554 (1975).

In the *Baxter* case this Court said:

> ". . . Without such certification and identification of the Class, the action is not properly a Class action. . . ."

The matter involved in this point is of critical importance. Many times an action may be brought as a class action while, later on, the plaintiff decides that it should be discontinued. It is submitted that, so long as certification has not been requested, a plaintiff should be permitted to discontinue his suit under the strictures of Rule 41(a). Otherwise the courts will be burdened with cases which, for one reason or another, are determined to be discontinued.

The Court of Appeals has ignored the significant precedents of this Court which are, of course, recent cases. The matter is one of substantial public interest and the Court should review this matter.

V.

The conduct of the plaintiffs' attorney was mandated under the facts of this case.

Underlying the decision of the Court of Appeals, although merely *dicta*, since the Court of Appeals affirmed the decision of the district court only upon the narrow ground that the district court had discretion to impose Rule 37 sanctions under the circumstances of this case, was the displeasure of the district court and of the Court of Appeals on the conduct of plaintiffs' counsel.

Based on the decisional law, however, plaintiffs' counsel could not have acted otherwise since it was imperative to avoid a situation wherein plaintiffs would be in *wilful default* of an order of the court.

Plaintiffs' counsel had, even prior to the date of the order of the district court, communicated with the plaintiffs to determine the information necessary to provide proper answers to the interrogatories involved. (It is noted, of course, that these answers required were *further answers*, the original interrogatories having been previously answered.)

On the day wherein these answers were due the plaintiffs' counsel had, in his possession, holographic answers of the plaintiffs involved. (The circumstances of the mailing of the draft copies to the respondent's attorney are in dispute factually and it is believed that there is no substantial evidence to support the factual findings made by the district court.) However, it is at least undisputed that, on the day in question, the *information* involved was in the possession of the plaintiffs' attorney.

If no attempt were made *at that time* to comply with the order of the court as best as could be done, then the plaintiffs would be in default of an order and be subject to dismissal of

their complaint. There was at least one case, *Cabales, supra*, which indicated that submission of draft answers to interrogatories would be in compliance with an order of the court provided that formal answers would be submitted at the earliest possible moment. Thus, it is submitted, under the Code of Professional Responsibility (see DR-7-101), plaintiffs' counsel had the duty to make as complete a compliance with the order of the court as he had power to do. Also, of course, it is undisputed that counsel for the plaintiffs also telephoned counsel for the defendant, Touche Ross, and informed him, by telephone, that formal answers to these interrogatories would be late.

This conduct is the appropriate conduct for a responsible attorney to engage in and the criticism by the district court and the Court of Appeals is believed to be unjustified.

If an attorney, in an attempt to comply with an order of the court in the best way that he can, where, for reasons beyond his control, he cannot fully comply, and, faced with a hostile district judge, subjects himself to sanctions and penalties, the independence of counsel and the right of a client to representation will be severely prejudiced. There is substantial public interest in this question and the Court should grant certiorari to determine the manner in which an advocate is permitted to act under similar circumstances.

VI.

The proceedings in this case, being quasi-criminal, mandate the granting of criminal safeguards to the petitioners.

These Rule 37 proceedings, involving the imposition of penalties upon the plaintiffs and their attorney, are quasi-criminal in nature. Hence the petitioners would be entitled to all of the normal criminal safeguards. This action, in addition, was a jury action and a jury demand was contained in the complaint.

In any type of quasi-criminal proceeding an accused is entitled to (1) notice of the charges, (2) confrontation of the witnesses against him, (3) privilege against self-incrimination, (4) proof of wilful failure beyond a reasonable doubt, (5) right to a jury trial.

This Court in *Gompers v. Bucks Stove & Range Co., supra,* set forth such rule. A more recent case is *Bloom v. Illinois,* 391 U.S. 194 which, in cases of criminal contempt, mandates a jury trial.

The Court of Appeals for the Second Circuit has mandated a jury trial even for statutory penalties (*cf., United States v. J.B. Williams Company, Inc.,* 498 F.2d 414).

Other cases mandating a jury trial in cases involving statutory matters are *Curtis v. Loether,* 415 U.S. 189, 193 where this Court said:

> ". . . Although the Court has apparently never discussed the issue at length, we have often found the Seventh Amendment applicable to causes of action based on statutes. . . ."

See also, *Dairy Queen, Inc. v. Wood,* 369 U.S. 469; *Hepner v. United States,* 213 U.S. 103; *Fleitman v. Welsbach Street Lighting Co.,* 240 U.S. 27; *Atchinson Topeka & Santa Fe Ry v. United States,* 178 Fed. 12; *Porter v. Warner Holding Co.,* 328 U.S. 395; *Texas & Pacific RR Co. v. Rigsby,* 241 U.S. 33; *Arnstein v. Porter,* 154 F.2d 464; *Ross v. Bernhard,* 396 U.S. 531 and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500.

In addition to failing to grant a jury trial in this case, the other requirements relating to quasi-criminal proceedings were not carried out by the district court. Firstly, of course, there was no notice of the scope and extent of the proceedings. The sole issue before the district court, at the hearings conducted by it,

related to the actual receipt by the plaintiffs' counsel of a single set of interrogatory answers of one Randolph. This appeared both at the outset of the hearing involved (JA2) and in the prior "Notice of Hearing" served by respondent's attorney which appears at JA592, 593. In both cases the hearing was limited to "the circumstances relating to the service on September 5th, 1974 of purported answers by plaintiff MARTIN F. RANDOLPH, JR. to interrogatories dated November 1, 1973 propounded by defendant Touche Ross & Co."

The decision of the district court, however, primarily focused on other circumstances to which no notice was given and hence due process was violated.

No instruction was given by the court relating to the privilege against self-incrimination by any witness who was called by the adverse party as required under due process strictures. The district judge, in order to find improper conduct on the part of the plaintiff IIPL and its attorney utilized his confidential notes to determine facts purportedly testified to where no transcript of testimony was made and acted as a witness in the proceeding.

No hearing was held with respect to the amount of the attorneys' fee award.

This Court, it is submitted, cannot permit such due process irregularities to stand. They fly in the face of all fairness and equity. This Court should set matters right.

CONCLUSION

The petition for a writ of certiorari should be granted as prayed for herein.

Respectfully submitted,

s/ I. Walton Bader
BADER and BADER
Attorneys for Petitioners

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DISMISSING FIRST APPEAL

Before MOORE and TIMBERS, Circuit Judges, and NEWMAN, District Judge.*

NEWMAN, District Judge:

Plaintiffs, Independent Investor Protective League ("IIPL") and Martin F. Randolph, Jr., and their attorney, I. Walton Bader, Esq., seek to appeal from a January 9, 1976, order entered in a suit brought by these plaintiffs and others against Teleprompter Corp., Touche Ross & Company ("Touche Ross"), and others. The order was entered after hearings on a motion pursuant to Fed.R.Civ.P. 37(b) and (d) by Touche Ross concerning plaintiffs' failure to comply with an order entered August 16, 1974, directing plaintiffs to answer Touche Ross' interrogatories within twenty days.[1] The District Court found that interrogatory answers had not been timely served and that Bader and Merrill Sands, secretary of IIPL, had made false representations to Touche Ross counsel and to the Court concerning service of the interrogatory answers. In essence, the Court found that copies of draft answers had been mailed to Touche Ross counsel to mislead them into thinking the originals had been timely signed and verified. The Court's order dismissed

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* Of the United States District Court, District of Connecticut, sitting by designation.

1. While the Rule 37 motion was pending before Judge Richard Owen, the IIPL suit was consolidated with several other suits against Teleprompter Corp. by an order entered by Judge Lloyd F. MacMahon on November 18, 1974. That order for consolidation was entered without prejudice to any order that may be made by Judge Owen in proceedings then pending before him.

the action as to Touche Ross with prejudice, directed IIPL and Bader to pay Touche Ross its expenses including counsel fees in connection with the Rule 37 motion and ensuing hearings, and referred the record for further consideration pursuant to Rule 5(f) of the General Rules of the District Court concerning disciplinary proceedings.

Appellants recognize that they encounter substantial obstacles in asserting a right to appeal at this stage of the litigation. The dismissal of the plaintiffs' claims against only defendant Touche Ross plainly adjudicates the "liabilities of fewer than all the parties" within the meaning of Fed.R.Civ.P. 54(b), and no direction for entry of judgment pursuant to that rule was made. This is entirely understandable since all the plaintiffs have endeavored to dismiss their claims voluntarily pursuant to Fed.R.Civ.P. 41(a)(1). Whether their notices of dismissal are effective is in some doubt in view of the fact that they brought the suit as a class action;[2] nevertheless their

2. Fed.R.Civ.P. 41(a)(1) is specifically made subject to Fed.R.Civ.P. 23(e), which precludes dismissal of a class action without approval of the court and notice to the class. Touche Ross asserts that court approval of a voluntary dismissal is required even though class certification had not been made when the voluntary dismissals were filed. *See Kahan v. Rosenstiel,* 424 F.2d 161, 169 (2d Cir.), *cert. denied,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970). There is also a substantial question whether Rule 41(a)(1) is available for dismissal of only one party rather than an entire action. *See Harvey Aluminum, Inc. v. American Cyanamid Co.,* 203 F.2d 105 (2d Cir.), *cert. denied,* 345 U.S. 964, 73 S.Ct. 949, 97 L.Ed. 1383 (1953). But it is by no means clear, as Touche Ross contends, that the voluntary dismissals are nullities. Each of them has been endorsed by Judge MacMahon "So ordered." They would seem to be court orders, at worse erroneous for lack of Rule 23(e) notice or otherwise, issues we do not determine. Touche Ross contends Judge MacMahon's signature "gave no validity" to the notices of dismissal (Appellee's Brief, p. 38), citing *Hyde Construction Co. v. Koehring Co.,* 388 F.2d 501 (10th Cir. 1968). But in that case, the ineffectiveness of the purported voluntary dismissal had been adjudicated on appeal and the District Court had been ordered to vacate the order of dismissal. *Id.* at 508. The dismissal orders in this case remain unreviewed, and, in the absence of a Rule 54(b) determination, unreviewable.

preference to have the case dismissed (albeit without prejudice) raises a serious question whether it would be appropriate to permit Rule 54(b) review of the dismissal with prejudice of their claims against Touche Ross in advance of resolution of the entire litigation.

The requirement that IIPL and Bader pay Touche Ross expenses in connection with the Rule 37(b) motion is not a final order since at most it adjudicates only liability, with determination of the amount of compensatory damages still to be litigated. Even at that point, it is far from clear that review can be obtained by IIPL before a final judgment in the entire litigation, see *Cromaglass Corp. v. Ferm,* 500 F.2d 601, 604-05 (3d Cir. 1974) (*en banc),* or even by Bader, who though not a party to the principal litigation, may be so allied with a party as to preclude interlocutory review of an order to pay compensatory expenses. But see *Cromaglass Corp. v. Ferm, supra.*

Appellants rest their claim to appealability solely on the trial court's reference of the record for consideration of disciplinary proceedings against Bader, which, they assert, makes the case "probably" appealable. (Appellants' Memorandum in Support of Motion to Remand, p. 3). How that portion of the challenged order would make the entire order appealable is not indicated. In any event, appellants' reliance on *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), is unavailing. By no stretch of the imagination is a trial court's reference of a transcript for consideration by those with responsibility for deciding whether to initiate disciplinary proceedings a "decision . . . in that small class which *finally* determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546, 69 S.Ct. at 1226 (emphasis

added).[3]

The appeal is dismissed.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, et al.,

Plaintiffs,

vs.

TELEPROMPTER CORP., et al.,

Defendants.

73 Civ. 4133

OWEN, District Judge

This motion to impose sanctions raises two serious questions: (1) whether the attorney for the plaintiffs mailed copies of purported clients' answers to interrogatories to an

3. Rule 5(f) of the General Rules applicable in the District Court for the Southern District of New York provides that complaints alleging grounds for disciplinary action against an attorney shall be presented to the Chief Judge of the District Court. If he deems the charges "of sufficient weight," he refers them to a bar association for its consideration. The recommendation of the bar association is presented to the Chief Judge. At that point the Chief Judge determines whether to order a formal proceeding against the attorney.

adversary on the last day permitted by a court order without in fact having any originals of such answers in hand from any client or any awareness of their existence, and (2) whether the attorney thereafter made false statements to counsel and the Court and gave false testimony as to the foregoing.

Defendant Touche Ross & Co. ("Touche Ross") has moved for the imposition of sanctions against plaintiffs, the Independent Investor Protective League ("IIPL"), Martin F. Randolph, Jr. ("Randolph"), Gary Michael ("Michael"), Michael Fagan ("Fagan") and their counsel, I. Walton Bader, pursuant to Rule 37(d) of the Fed. R. Civ. P. Sanctions are sought by virtue of circumstances disclosed in hearings held before me relating to the service on September 5, 1974 of copies of purported answers of plaintiffs to Touche Ross' Interrogatories dated November 1, 1973.

Touche Ross charges that plaintiffs and their counsel conspired to mislead Touche Ross into believing that the original answers to the November 1, 1973 Interrogatories had been received from plaintiffs Randolph, Michael and Fagan on September 5, 1974, prior to service of the copies when in fact they had not been received, and plaintiffs' counsel had no awareness even of their existence.

It is further charged by defendant Touche Ross that when, on September 11, 1974, it was disclosed that the original answer of Michael and Fagan had *not* been received on September 5, 1975, plaintiff IIPL and Mr. Bader misled Touche Ross and the Court into believing that the original answers of Randolph had been received on September 5, 1975, when they had not been, and further that unconformed copies of the proposed answers of Michael and Fagan had been served "inadvertently" by someone other than Mr. Bader.

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As this motion involved serious allegations, I held hearings on November 9, 13 and 14, 1974. I find the following facts.

The Events Prior to September 6, 1974:

In February 1974, I held a status conference in this action. At that time, it was disclosed to me that answers to certain interrogatories propounded by Touche Ross dated November 1, 1973, were long overdue. I therefore orally directed Mr. Bader, counsel to plaintiff, to promptly answer those interrogatories.

Apparently nothing happened and six months later, on August 16, 1974, I granted a written motion by Touche Ross to compel each of the plaintiffs to respond to the interrogatories and directed that the order be complied with within 20 days, the 20th day being September 5, 1974, a Thursday.

The Events of Friday, September 6, 1974:

On September 6, under postmark of September 5, Mr. Eno, a partner in the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil (the "Rosenman firm"), representing defendant Touche Ross, received in the mail a copy of purported answers of IIPL.[1] In a separate enclosure, also under postmark of September 5, copies of purported answers of individual plaintiffs Randolph, Fagan and Michael were received.[2] All of these copies were unconformed, except that the IIPL answers had written in, in the verification, the words, "s/ Merrill Sands." Sands was the controlling officer of IIPL.

1. The copy of the answers of IIPL bore the typed date September 5, 1974.

2. The copies of the answers of Randolph, Fagan and Michael each bore the typed date, August 29, 1974. These three plaintiffs lived in states other than New York and Mr. Bader apparently had prepared and mailed the proposed answers to each to consider, execute if appropriate, and return.

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Mr. Eno that day mailed a letter to Mr. Bader requesting that the originals of the several answers be immediately filed pursuant to Rule 6(c) of the General Rules of this Court. The letter noted the failure to conform the copies of the several answers and requested information regarding the same, including whether they had actually been signed and sworn to by the several plaintiffs.

The Events of Monday, September 9, 1974:

On Monday, September 9, at 9:15 A.M., Ms. Rosen, a receptionist in the Rosenman office, received a telephone message from Mr. Bader for Mr. Eno stating:

> "Rec'd your letter about Teleprompter case. Will send you photocopies of original Interrogatory answers within next few days."

At 10:37 A.M., Mr. Bader called Mr. Eno again; Mr. Eno was not available to take the call, and Mr. Bader could not be reached when Mr. Eno returned the call.

Thereupon, Mr. Eno hand-delivered a letter to Mr. Bader. That letter stated:

> "Dear Mr. Bader:
>
> We today received a telephone message from you in response to my letters of September 6 and 7 in which you say that you will send us copies of the original Interrogatory answers 'within the next few days.' This is unsatisfactory to us. Mr. Nevling is prepared to come to your office immediately to inspect the originals, if they have not already been filed. If that opportunity is not afforded by the end of today or the originals are

not filed by the end of today pursuant to Rule 6(c) of the General Rules of the Court, we shall assume that you do not have the originals and did not have them on September 5, 1974, and shall proceed accordingly."

The Events of Tuesday, September 10, 1974:

On Tuesday, September 10, at 9:25 A.M., Mr. Eno's secretary received a telephone call from Mr. Bader, and typed up his message as follows:

> "Mr. Bader called. Re Interrogatories. He will be sending photocopies of original answers. He extends his apologies. He will extend your time to answer for 2 1/2 or 3 weeks."[3]

About 10:30 A.M., Mr. Eno called Mr. Bader, and was told that he was unavailable. Mr. Eno then told Mr. Bader's secretary to have him call Mr. Eno as a matter of urgency, and that if Mr. Eno did not hear from Mr. Bader, he intended to communicate with the Court. Mr. Bader's secretary said that she would try to reach him. Thereafter, Mr. Bader's secretary called Mr. Eno back and stated that she had been unsuccessful in reaching Mr. Bader and asked Mr. Eno to wait until 1:00 P.M. before calling the Court, to which Mr. Eno agreed. Mr. Bader called Mr. Eno at about 12:30 P.M. Mr. Eno told him he was not satisfied with the messages that he had been receiving and that he wanted to see the original answers of all the plaintiffs immediately. Mr. Bader said that Mr. Eno had a right to see them but that he was busy on a deposition and could not show them immediately, but would in a few days. Mr. Eno insisted on seeing them that day and told Mr. Bader that he did not believe

3. Mr. Bader does not dispute this message, except that he recalled saying "copies" rather than "photocopies."

that Mr. Bader had the originals. Mr. Bader then stated, "I have them. You can take my word for it." Mr. Eno said that he or Mr. Nevling would meet Mr. Bader in his office later that day after the deposition. Mr. Bader said that was not possible because he did not know where in his office the originals were and he might have left them at home. Mr. Eno said that he would then meet Mr. Bader in his office at 9:00 A.M. the next morning, to which Mr. Bader agreed.[4] Mr. Eno thereupon sent

4. Mr. Bader, in testimony before me, at first did not recall this conversation at all:

> Q. You don't recall your conversation with me on September 10th when your secretary told you that you had better get in touch with me and you say you called me from the offices of White & Case? Do you remember that? A. I say I may have spoken to you, Mr. Eno. I don't recall the conversation.
>
> Q. You don't recall the conversation? A. No, sir.
>
> Q. At all? You have no recollection of that conversation? A. No, sir.

Later, his recollection was in part refreshed and he testified:

> Q. Did I answer you by saying I didn't want to take your word for it, I wanted to see them? Does that refresh your recollection at all? A. I believe you said something like that, yes, sir.
>
> Q. And did you — A. And I said I couldn't do it that day because I was tied up in depositions, it was late and I couldn't get back to the office, I didn't know where the originals were, I hadn't been in the office for several days, but if you came in bright and early the next morning I would be very happy to show them to you.

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to Mr. Bader by hand the following letter:

> "Dear Mr. Bader:
>
> This will confirm your statement to me that at 9:00 A.M. tomorrow in your office you will exhibit to Mr. Nevling of our office the originals of the purported further answers of plaintiffs Michael F. Randolph, Jr., Gary Michael and Michael Fagan, as well as the original further answers of IIPL."

The Events of Wednesday, September 11, 1974:

Early on the morning of September 11, Mr. Nevling went to Mr. Bader's office where he was shown the original answers of IIPL by Mr. Bader. They were dated September 5, 1974 and purportedly were sworn to on September 5, by Merrill R. Sands, as Secretary of IIPL, in New York County. Mr. Bader was the notary who took Sands' signature and the answers were also signed by Mr. Bader. Mr. Bader also exhibited the original answer of Randolph dated August 29, 1974 and purportedly sworn to on September 3, 1974 by Randolph in California; and the answers were also signed by Mr. Bader.

When Mr. Nevling asked for the answers of Fagan and Michael, Mr. Bader said that he could explain, and gave Mr. Nevling his affirmation dated September 11, 1974 which Mr. Bader had drawn to support a motion for extension of time to answer. The affirmation merely stated that the answers of Fagan and Michael had not yet been received.[5]

---

5. That affirmation said nothing about copies of any answers being "inadvertently" sent to the Rosenman firm.

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Later that day, Mr. Eno sent a hand-delivered letter to the Court, with a copy to Mr. Bader. In that letter, Mr. Eno noted, among other things, that in his conversation with Mr. Bader the day before (September 10) Mr. Bader had assured Mr. Eno that he had the originals but that he did not know where the originals were in his office and that he might have left them at home.

Subsequently that day, Mr. Bader also sent a letter to the Court, with a copy to Mr. Eno. Therein he stated among other things:

> On September 5, he had Sands sign the IIPL answers and he, Bader, "instructed My Secretary to send copies . . . to all attorneys. . . .[6] and that he, Mr. Bader, inspected those copies before they went out and they were 'properly conformed.' "
>
> In the afternoon of September 5, he had to leave his office for St. Louis, but before he left the office, Mr. Bader "prepared" copies of the

---

6. His secretary, one Dorothy Blacker, later testified that she did not mail out anything at all, and contradicted Mr. Bader's statement about any instructions to send copies.

> Q. Your testimony is that after you typed those Exhibits A,C,D and E [the answers to interrogatories] you had no conversation with Mr. Bader about those documents at all, is that correct? A. Correct.
>
> Q. Did he ever tell you that you should be on the alert to look for a letter coming from the people to whom you mailed the originals, that is, C, D, and E? A. No.

Similarly, Mr. Sands, who later testified that it was *he* who mailed the unconformed answers, also testified that Mr. Bader had *not* instructed him to mail any answers out (see Fn. 10, *infra*).

answers which he intended to conform and mail when he returned from St. Louis.[7] "By inadvertence" on that day (September 5) "apparently" a set of the unconformed answers had been sent to the Rosenman firm. Further, on September 5 he was told during his absence from his office that "Randolph's answers" had arrived.

On September 9, again while he was out of the office, he was told about the receipt of Mr. Eno's letter of September 6 but did not know its contents. Believing that the Rosenman letter of September 6 referred to the answers of Randolph, Fagan and Michael, he called the Rosenman office on September 9 and 10, and the messages he left were to the effect that he "hoped to receive the signed copies of the original documents in a few days."[8] That it was not until about 6:00 P.M. on September 11, when he arrived in his office, that he "for the first time" realized what had happened.

Events Subsequent to September 11, 1974:

Apparently, on September 17, 1974, Sands, Bader's client, executed an affidavit in which he stated that he was the one who had "inadvertently" mailed the unconformed copies of the

7. It should be noted that (a) these would in any event therefore have been late under the Court's order and (b) Mr. Bader did not in fact go to St. Louis on September 5. He later testified to having worked in the library of the New York Law Institute for several hours that afternoon so that he "missed his plane" to St. Louis, went home to Scarsdale and went the next morning.

8. Mr. Bader's testimony on this subject is set forth in Fn. 4 *supra*. This September 11 letter obviously differs from Mr. Bader's telephone message to Mr. Eno's secretary the prior day, September 10 (p.5-6 *supra*), the essential accuracy of which he did not dispute (see Fn. 3 *supra*).

Randolph, Fagan and Michael answers on a visit to Mr. Bader's office late in the day on September 5;[9] that prior to mailing them he had seen Randolph's answers "which had arrived late in the day at Mr. Bader's office and I then assumed that I could send out the copies thereof."

On September 20, Mr. Bader addressed the Court on this matter on the argument of Touche Ross' motion to dismiss. At that time he made the following statements:

1. That he left his office on September 5 at about 3:00 P.M.

2. That Sands was with him when he left the office, and he told Sands that if the answers of the other plaintiffs came in he should mail out the copies.[10]

3. That *after* he left (at about 3:00 P.M.) Randolph's answers came in in the mail and that Sands had inadvertently mailed out *all* the answers instead of just Randolph's.

4. That Randolph's answers had come in in the 3:00 o'clock mail on September 5.[11]

9. It should be noted that in October 1974, before the hearing, Mr. Bader wrote the Court a letter expressing concern at possibly not being able to have Mr. Sands' testimony to support the foregoing. This "problem" did not materialize and on the hearing it was revealed that Sands was Bader's brother-in-law.

10. Sands, however, testified (1) that he spent the middle of the day downtown in New York City and came back to the office later after both Bader and his secretary had left; and (2) that Bader had not instructed him to mail out anything. See Fn. p. 13 *infra*.

11. Mr. Bader testified later that the last mail normally came in at 3:30 P.M. However, records of the U.S. Post Office revealed that the last mail carrier to Mr. Bader's office on September 5 had finished his deliveries and had returned to the post office by 2:07 P.M. The time of his last delivery to Mr. Bader's building, therefore, was 1:30 to 1:45 P.M.

5. That he did not recall when he first learned that the unconformed copies had been sent, but he knew that when he spoke with Mr. Eno on September 10.

Mr. Bader testified during the hearings held on November 4, 13, 14, 1974. At that time his final version of the facts was that Sands signed the original answers of IIPL in Mr. Bader's office between 8:30 — 9:30 A.M. on Thursday, September 5; that copies of those answers were put in envelopes, labels were put on the envelopes, Sands took the envelopes to mail and immediately left the office.[12] Sands then testified that by arrangement, later in the day, after Bader and his secretary had both left, he went back to Bader's office. It was empty. He saw that Randolph's answer had come in in the late mail. He waited, and Bader telephoned from the library of the New York Law Institute, and, as he testified:

> "I got a telephone call on 61, [Bader] called in at four, quarter after four, some time a little after four it was. And I said, you don't have to worry, the Teleprompter answers are here. He said fine, good. I said, go, have a good trip now. He said, good. That's it. Hung up."

Based on that conversation, which was devoid of any authority, Sands, the client, who had not been told by anyone to

12. The Interrogatories bear the typewritten date, September 5. Mrs. Blacker, who typed the Interrogatories, testified that she came to work at perhaps 10:20 and never saw Mr. Sands. She testified that she dates papers the day she types them and remembers no instructions otherwise as to these Interrogatories. I credit this testimony. The question therefore arises: if she typed the Interrogatories *after* her arrival on September 5, what of the Bader and Sands testimony that Sands signed and Bader notarized it and Sands took it away to mail *before* her arrival that day?

mail anything,[13] allegedly took it upon himself, without notifying Bader, to take the envelopes from his lawyer's desk containing the unconformed copies of *all* the sets of answers of Interrogatories and mail them out, thus "inadvertently" causing

13. Sands testimony was as follows:

> Q. And he [Bader] didn't tell you to mail them? A. No, he didn't tell me to mail them.
>
> Q. What induced you to mail them? A. Because that's one of the reasons I went to his office in the morning was to sign so that my thing should be mailed out so I figured those had to go out.
>
> Q. You had him on the telephone, he was on the telephone? A. Right.
>
> Q. Important matter. You didn't say to him, "Should I mail them out?" A. No, I didn't.
>
> Q. You didn't. And he didn't say to you, "Mail them out?" A. He didn't tell me to mail them.

Bader's testimony was to like effect:

> The Court: Mr. Bader, at 4:15, as far as you knew the three carbon copies were sitting on your desk?
>
> The Witness: Yes, sir.
>
> The Court: And that was the last day to mail?
>
> The Witness: Yes, sir.
>
> The Court: And you did not tell Mr. Sands, now you can conform them and mail them?
>
> The Witness: No, sir.

the whole problem.[14] I reject this concocted story as I reject Mr. Bader's explanation that he was so busy that he never got to his office for the next several days to "learn" what had happened.

Rule 37 of Fed. R. Civ. P. provides that if a party fails to serve answers to interrogatories (particularly after a court order providing therefor) the court may dismiss the action and, in addition, require the party failing to act or the attorney for said party, or both, to pay the reasonable expenses, including attorneys' fees caused by the said failure to act, unless the court finds that the failure was "substantially justified or that other circumstances make an award of expenses unjust."

On the entire record before me, it is clear and I cannot but conclude that Mr. Bader intended the Rosenman firm to believe that the various answers to interrogatories were due and timely served in accordance with the Court's order on the very last day for such service, September 5, 1974, when in fact they had not been. I also cannot but conclude that thereafter Messrs. Bader and Sands[15] made false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later

14. Significantly, although Mr. Bader by September 11 was aware of the fact (1) that the Rosenman firm had raised serious questions with the Court as to a deception on his part, and that (2) certain papers *had* been mailed by *someone* from his office giving substance to these contentions, it was not until September 15, four days later, that, according to his brother-in-law Sands, he first spoke to him about the incident, and even more time elapsed according to his secretary before he spoke to her about the matter. The inference one feels compelled to draw is that since Mr. Bader knew that he himself had sent out the unconformed copies on September 5 without having secured the originals, the conversations with Sands and his secretary coming so much later were "window dressing" for the court hearing that was foreshadowed.

15. It is reasonably clear that Mr. Bader did not bring Mr. Sands into the picture as the "unknown mailer" until some time after his [Bader's] September 11 letter to the Court since in that letter he indicated that his secretary had mailed the copies in question. (See p. 9-10 *supra*).

the Court as to the circumstances surrounding the mailing of the purported "answers" to interrogatories on behalf of plaintiffs Independent Investor Protective League and Fagan, Michael and Randolph on September 5, 1974. Mr. Bader flatly conceded to Mr. Nevling on September 11 (and later to the Court) that the Fagan and Michael original answers had never been received.[16] Given Mr. Bader's story of leaving his office on September 5 at 3:00 P.M. (although subsequently changed) and the Post Office proof of the last delivery being before 2:00 P.M. on that day, obviously, the Randolph answers were not received by his office in the "late" or any other mail on September 5, the last day for service. They could only have arrived on a subsequent day. As to the answers of IIPL, I credit Mrs. Blacker's testimony from which I conclude that the IIPL answers dated September 5 were typed on that day at some point between 10:20 A.M. and 3:00 or 3:15 P.M. Given this, the testimony of Messrs. Bader and Sands to the effect that the IIPL answers were signed and notarized around 9:30 that morning is necessarily false. There being no credible evidence as to when these answers were thereafter, in fact, executed, I am unable to conclude that they were timely executed and served. I therefore dismiss the entire action as to Touche Ross with prejudice.[17]

Given the conduct of Messrs. Bader and Sands, I determine that plaintiff Independent Investor Protective League and attorney I. Walton Bader shall pay to the defendant Touche Ross & Co. the actual expenses, including attorneys' fees, incurred by Touche Ross commencing with September 6, 1974, occasioned by this conduct. To that end, the attorneys for Touche Ross are to submit within 30 days in affidavit form a

16. This September 11 admission is squarely in conflict with his undisputed earlier phone messages to Mr. Eno's secretary on September 9 and 10. (See Fn. 3 *supra*.)

17. At some point during the pendency of this motion, voluntary discontinuances were filed on behalf of the individual plaintiffs.

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statement of such services rendered for the period commencing September 6, 1974, to which plaintiff IIPL and I. Walton Bader may respond, so that I may reach an appropriate conclusion on this issue.

The foregoing is so ordered.

While it is not germane to a determination of the motion of Touche Ross, it is not inappropriate to observe that conduct such as that engaged in by plaintiffs' counsel herein cannot and will not be countenanced by the Court. I am, therefore, referring this record for further consideration pursuant to Rule 5(f) of the General Rules of this Court providing for the disciplining of attorneys.

s/ R. Owen
United States District Judge

January 9, 1976.

APPENDIX C

MEMORANDUM DECISION OF JUDGE MacMAHON OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY LEWIS et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP. et al.,

Defendants.

73 Civ. 3929-LFM
73 Civ. 4109-LFM
73 Civ. 4133-LFM
73 Civ. 4895-LFM
73 Civ. 3025-LFM
74 Civ. 3281-LFM
74 Civ. 4341-LFM

(Filed July 29, 1976)

MacMAHON, District Judge.

Plaintiffs Independent Investor Protective League, Michael Fagan, Martin Randolph, Sadie Mosner, Rose L. Gross, G. Dixon Mahon, Robert W. Stoddard, and John C. Bernius move for a modification of the injunctive provisions in this court's order of consolidation of November 15, 1974 so as to permit them to institute class litigation against defendant Touche Ross

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& Co. in the New York state court. Plaintiffs also move for a determination that my brother, Judge Owen, was without jurisdiction to impose sanctions on Independent Investor Protective League and its attorney, I. Walton Bader, by reason of a stipulation of voluntary dismissal filed in 73 Civ. 4133. In the alternative, plaintiffs move for reconsideration of Judge Owen's order based on newly discovered evidence.

Since both issues relating to Judge Owen's order are presently on appeal to the Second Circuit this court does not have jurisdiction to consider plaintiff's second and third motion. *Landman v. Mitchell,* 445 F.2d 274 (5th Cir. 1971), *cert. denied,* 404 U.S. 1022 (1972); *Sykes v. United States,* 392 F.2d 735, 738 (8th Cir. 1968); *Ideal Toy Corp. v. Sayco Doll Corp.,* 302 F.2d 623, 625 (2d Cir. 1962). We consider, therefore, only plaintiffs' motion to modify the injunctive provisions of our consolidation order.

This is a consolidated class action alleging fraud in the sale of Teleprompter Corp. stock. The liability of Touche Ross is premised on its certification of various financial statements of Teleprompter. In the order of consolidation, we enjoined all present and former stockholders of Teleprompter from commencing or continuing any derivative or representative actions against any of the defendants based upon any of the transactions complained of in the constituent actions. Movants, who now feel that their claim against Touche Ross under Section 10 of the Securities Exchange Act of 1914 will not succeed, seek to commence a class action in state court against the accountants based on common law theories of negligence and the New York State Securities Acts, and concerning the same transactions involved in the federal suit.

To allow litigation in state court would serve only to further tangle already complex litigation. The federal complaint already

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alleges common law liability of the accountants, as well as liability under several sections of the Securities Act of 1933 and the Securities Exchange Act of 1934. This court has pendent jurisdiction over any further related state claims.

Accordingly, plaintiffs' motion for modification of our consolidation order, for reconsideration of Judge Owen's order, or a determination that Judge Owen's order was entered without jurisdiction is denied.

So ordered.

Dated: New York, N.Y.
July 29, 1976

s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

APPENDIX D

MEMORANDUM DECISION OF JUDGE MacMAHON ACTING PRIOR "SO ORDERED" NOTATIONS OF NOTICES OF VOLUNTARY DISMISSAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEPENDENT INVESTOR PROTECTIVE LEAGUE et al.,

Plaintiffs,

-against-

TELEPROMPTER CORPORATION et al.,

Defendants.

HARRY LEWIS et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP. et al.,

Defendants.

73 Civ. 4133
73 Civ. 3929

MacMAHON, District Judge.

Civil action 73 Civ. 4133 was assigned to Judge Owen but is related to 73 Civ. 3929, assigned to me, and normally the later action (73 Civ. 4133) would have been transferred to me

pursuant to Calendar Rule 13 of this court (related case rule). However, before either Judge Owen or I was aware of the related nature of these two cases, certain proceedings with respect to a motion by defendant Touche Ross & Co. to dismiss 73 Civ. 4133 under Rule 37, Fed.R.Civ.P., were pending before Judge Owen, who held hearings on that motion on November 3, 13 and 14, 1974.

My order of November 18, 1974 consolidating these two cases and several others, therefore, expressly provided that:

> "The consolidation here ordered shall be without prejudice . . . to constitutent action bearing number 73 Civ. 4133, to any order that may be made by Hon. Richard Owen, U.S.D.J., in proceedings pending before him."

Judge Owen filed an opinion and order on January 9, 1976 dismissing the action against Touche Ross & Co., assessing expenses against plaintiff, Independent Investor Protective League, and its attorney, and referring the record for further consideration (disciplinary proceedings) pursuant to General Rule 5(f) of this court. Plaintiff and its attorney appealed from that order and the appeal was dismissed by the Court of Appeals on September 17, 1976.

In the interim, however, counsel for plaintiffs submitted to the clerk's office two separate notices of voluntary dismissal of 73 Civ. 4133, pursuant to Rule 41, Fed.R.Civ.P. The clerk's office understandably, but erroneously, in view of the express reservation in the order of consolidation, sent the notices to me for my signature. The notices should have been directed to Judge Owen, since the proceedings in 73 Civ. 4133 were still pending before him, as they are to this day. Those notices were "So Ordered" and inadvertently signed by me in the course of routine business, without any awareness or intention that they

should terminate or in any way undermine or affect Judge Owen's jurisdiction over proceedings pending before him in 73 Civ. 4133.

Accordingly, I hereby vacate:

(1) the "Order and Notice of Voluntary Dismissal Pursuant to Rule 41(a)(1)(i) FRCP of Plaintiff Martin F. Randolph, Jr. Only," signed on October 15, 1974 and docketed on October 17, 1974; and

(2) the "Order and Notice of Voluntary Dismissal Purs. to FRCP 41," signed and docketed on January 23, 1976.

Since the order of consolidation specifically excepted the proceedings pending before Judge Owen in 73 Civ. 4133, he is the appropriate judge to hear and determine any matters relating to or arising out of those proceedings or that action. The remaining matters of this motion, including the letter application to disqualify Judge Owen, are, therefore, respectfully referred to Judge Owen.

So ordered.

Dated: New York, N.Y.
December 8, 1976

s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

APPENDIX E

MEMORANDUM DECISION OF JUDGE OWEN IMPOSING RULE 37 SANCTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP., et al.,

Defendants.

73 Civ. 4133

(Filed Mar. 7, 1977)

OWEN, District Judge

There are before me at this time three matters in this case — (1) a "motion" to recuse; (2) a motion to vacate discovery notices in connection with the recusal motion; and (3) a determination with respect to the amount of attorneys' fees for services for the reasons set forth in my opinion of January 19, 1976.

The motion to recuse, not formally before me in motion papers, but nevertheless suggested by certain affidavits filed herein, based upon my acquaintance with Lawrence R. Eno, Esq. over the years, is frivolous and is denied. There is no necessity on the facts to require another district judge to pass on it.

Appendix E

Given the foregoing, the motion to vacate discovery notices obviously sought in support of the motion to recuse is similarly denied.

On January 9, 1976, I directed the attorneys for Touche Ross to submit an affidavit bearing upon services rendered in connection with the proceeding before me as described in that opinion. That affidavit was furnished, opposing affidavits have been received and a reply affidavit has been submitted by Touche Ross. A threshhold question is whether an evidentiary hearing is required as demanded by I. Walton Bader. I conclude that an evidentiary hearing is not required. The entire court proceeding was before me and consisted of a hearing held over parts of several days. On that hearing, it was revealed how much the Rosenman firm had done *before* the problem surfaced to try to deal with it. The post-trial briefing was detailed and extensive. I am therefore personally aware of the services performed and in a position to determine from those observed services what preparation was involved. The affidavits show that a lot of high-quality work was done, as one would expect from the Rosenman firm. In the exercise of discretion, I conclude that an appropriate award of attorneys' fees herein is $7500. I further award the cost of the transcript herein and the witness fees, etc., totaling $574.38. There is no question but that the transcript was required in this matter in order that the Court might fully, fairly, and painstakingly consider all the issues which were of critical importance to both sides. The witness fees and mileage were similarly required for a witness whose proof shed valuable light upon the issues.

Submit order on notice.

March 4, 1977.

s/ R. Owen
United States District Judge

APPENDIX F

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 187, 188, 189—September Term, 1977.

(Argued October 17, 1977 Decided April 4, 1978.)

Docket Nos. 77-7187, 77-7271, 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,

Plaintiffs-Appellants,

and

I. WALTON BADER,

Appellant,

v.

TOUCHE ROSS & COMPANY,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and TIMBERS,

Circuit Judges.

Appeal from judgment pursuant to Fed. R. Civ. P. 54(b) entered in the Southern District of New York, Richard Owen, *District Judge,* which imposed sanctions under Fed. R. Civ. P. 37 against plaintiffs and their counsel for failure to comply with an order requiring service of answers to interrogatories by a specified date.

Affirmed.

Appendix F

I. WALTON BADER, White Plains, N.Y. (Bader & Bader, White Plains, N.Y., on the brief), *for Plaintiffs-Appellants and Appellant Bader pro se.*

GERALD WALPIN, New York, N.Y. (James K. Nevling, Jr., and Rosenman Colin Freund Lewis & Cohen, New York, N.Y., on the brief), *for Defendant-Appellee Touche Ross & Company.*

TIMBERS, *Circuit Judge:*

The narrow issue on this appeal is whether the district court, in imposing sanctions under Fed. R. Civ. P. 37 against plaintiffs and their counsel for failure to comply with an order requiring service of answers to interrogatories by a specified date, abused its discretion. We hold that the district court acted well within its discretion under the particular circumstances of this case. We affirm.

I.

Appellants are Independent Investor Protective League (IIPL); three individuals, Martin F. Randolph, Jr., Gary Michael and Michael Fagan; and I. Walton Bader, attorney for IIPL and the three individuals. Appellee is Touche Ross & Company (Touche Ross).

Appellants (except Bader) were the four named plaintiffs below in a class action brought on behalf of the stockholders of Teleprompter Corporation (Teleprompter) against Teleprompter, Touche Ross and others (the action).[1]

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1 The action which was commenced on September 26, 1973 in the Southern District of New York is entitled *Independent Investor Protective League, et al.* v. *Teleprompter Corporation, et al.* (Dkt. No. 73 Civ. 4133). It sought damages for alleged violations of the federal securities laws.

On November 18, 1974, while the Rule 37 motion was pending before Judge Owen, the instant action was consolidated with other similar actions under the caption *Harry Lewis, et al.* v. *Teleprompter Corporation, et al.* The consolidation was made without prejudice to any order that Judge Owen might make in the instant Rule 37 proceedings.

Touche Ross remains as a defendant in the consolidated action. The final judgment in the instant action expressly provides that it is to have no effect whatsoever on the consolidated action.

The consolidated action, from which the Rule 37 proceedings before Judge Owen were excluded, was assigned first to Judge MacMahon and presently is assigned to Judge Broderick.

Appendix F

As the result of a series of discovery proceeding events detailed below, an order was entered on January 9, 1976, after hearings, in the Southern District of New York, Richard Owen, *District Judge,* upon motion of Touche Ross pursuant to Fed. R. Civ. P. 37, which dismissed the action as against Touche Ross with prejudice and ordered IIPL and Bader to pay to Touche Ross the latter's expenses, including attorneys' fees, in connection with the Rule 37 motion and ensuing hearings.[2]

On an earlier appeal to our Court from the January 9, 1976 order by plaintiffs IIPL and Randolph and their attorney Bader, we dismissed the appeal on September 17, 1976 for lack of appellate jurisdiction, pointing out that there was no direction for the entry of final judgment pursuant to Fed. R. Civ. P. 54(b) and that the amount of expenses, including attorneys' fees, to be paid by IIPL and Bader to Touche Ross remained to be determined. 542 F.2d 156.

Thereafter a final judgment was entered on May 11, 1977 pursuant to Rule 54(b) which dismissed the action as

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2 Judge Owen also referred the record to the Chief Judge of the District Court for further consideration pursuant to Rule 5(f) of the General Rules of the Southern District of New York which provides for disciplining of attorneys. This matter is not before us on the instant appeal.

against Touche Ross with prejudice and ordered that Touche Ross recover of IIPL and Bader the sum of $8,074.38 ($7500 attorneys' fees, $549.38 transcript cost and $25 witness' fees) representing the reasonable expenses of Touche Ross in connection with the Rule 37 motion and hearings.

From the judgment of May 11, 1977, the instant appeal has been taken.[3]

II.

The events which led to the imposition of the Rule 37 sanctions here under review began on November 1, 1973—about a month after commencement of the action—when Touche Ross served on plaintiffs eleven relatively simple interrogatories. They called for information regarding the organization and membership of IIPL; the identity of the three individual plaintiffs; and the details of plaintiffs' acquisitions of shares of Teleprompter.

Plaintiffs at no time interposed objections to these interrogatories. They simply ignored them and failed to respond for more than eight months.

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3 Symptomatic of the genius for confusion which appellants' counsel has demonstrated throughout are the *three* separate notices of appeal he has filed, one of which we dismissed with double costs as premature and nugatory since it was filed before there was any order or judgment from which to appeal. We thereafter ordered all dockets consolidated on the instant appeal.

We do not share the doubt, expressed in the opinion on the prior appeal, 542 F.2d at 57-58, that an appeal is now proper. However, appellants press the argument that Judge MacMahon's orders allowing voluntary dismissals, see 542 F.2d at 157 n.2, although subsequently vacated by him, precluded Judge Owen from directing dismissal and imposing attorney's fees and costs. We need not pursue appellee's argument that the orders allowing voluntary dismissal were invalid for lack of compliance with F.R.Civ.P. 23(e) or otherwise and appellants' answers thereto. The voluntary dismissals were an obvious ploy to avoid what Bader rightly feared Judge Owen might do. When Judge MacMahon realized that he had been imposed upon, he properly vacated the orders.

After several directions by the court to plaintiffs and their attorney, Bader, to answer Touche Ross' interrogatories,[4] on August 16, 1974 Judge Owen granted a written motion by Touche Ross pursuant to Rule 37(a)(2) to compel each of the plaintiffs to respond to the interrogatories. The judge ordered compliance within twenty days, i.e., by Thursday, September 5, 1974. This order was announced in open court on August 16, at which time Bader was present.

On September 6, counsel for Touche Ross received in the mail two envelopes, each postmarked September 5. One contained a copy of the purported answers of IIPL bearing the typed date, September 5, 1974. The other contained copies of the purported answers of each of the individual plaintiffs, each bearing the typed date, August 29, 1974, although the individual plaintiffs, Randolph, Fagan and Michael, lived in California, Connecticut and Vermont, respectively.

All of the copies of the answers, with one exception, were unconformed, there being no indication whether they

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4 On December 11, 1973 Judge Griesa, to whom the case originally was assigned, orally directed that answers to the interrogatories be served so as to be available on a motion to dismiss the amended complaint. Bader first agreed to serve the answers by January 18, 1974. Later he told the court he would serve them by February 1, but failed to do so.

After the case was assigned to Judge Owen a status conference was held, at which time Judge Owen orally directed Bader to serve the long overdue answers not later than February 5, 1974. Again he failed to do so; nor did he bother to request or obtain an extension for compliance.

Not until July 15, 1974—more than eight months after the interrogatories had been served—did Bader get around to serving purported answers to the Touche Ross interrogatories. These answers were incomplete and unresponsive. No answers at all were served on behalf of the three individual plaintiffs, although five of the eleven interrogatories were propounded specifically to them. The answers on behalf of IIPL amounted to little more than references to allegations in the amended complaint.

This triggered Touche Ross' Rule 37(a)(2) motion of August 2, made returnable August 16, which Judge Owen granted as stated in the text.

had been signed and sworn to by plaintiffs. The one exception was that, as part of the verification of IIPL's answers, there appeared the following: "/s/ Merrill Sands". Sands was an officer of IIPL and a brother-in-law of Bader (as disclosed at the subsequent hearing before Judge Owens).

Being understandably suspicious of the form of the purported answers, counsel for Touche Ross, on September 6, the same day the answers were received, wrote to Bader requesting that the originals of the answers be filed pursuant to Rule 6(c) of the General Rules of the Southern District of New York. This letter also noted the failure to conform the copies of the answers and inquired whether they actually had been signed and sworn to by the several plaintiffs.

In response to this and another request from counsel for Touche Ross, Bader insisted that he would send photocopies of the original interrogatories "in a few days." Not satisfied, counsel for Touche Ross on September 10 demanded to see the originals. Bader, while averring that he had the answers to the interrogatories, stated that he could not show them on that day because he was not in his office and did not know where in his office the interrogatories were and that he might have left them at home. An appointment was set up for the following morning at Bader's office, which counsel for Touche Ross confirmed by letter. On the morning of September 11, Bader showed to counsel for Touche Ross the original answers of IIPL (purportedly sworn to by Sands, as Secretary of IIPL, on September 5 before Bader as notary public) and the original answers of plaintiff Randolph (purportedly sworn to on September 3 before a notary public in California). The answers of IIPL and Randolph were dated September 5 and August 29, respectively; they were signed by Bader as attorney.

Also in Bader's office on September 11, counsel for Touche Ross requested to see the original answers of the other two plaintiffs, Fagan and Michael. Bader admitted that he had not received them. He was unable satisfactorily to explain why copies of the purported answers of these two plaintiffs, each dated August 29, had been mailed by Bader to counsel for Touche Ross on September 5.

In light of these disclosures, counsel for Touche Ross informed Judge Owen by a hand-delivered letter on the same day, September 11, of these disclosures and of Bader's noncompliance with the courts' order of August 16.

On September 20 Judge Owen heard arguments on a motion by Touche Ross, brought on by an order to show cause dated September 13, to dismiss the action as against Touche Ross pursuant to Rule 37(b) and (d); and on a motion by plaintiffs for an extension of time with respect to the interrogatory answers of plaintiffs Fagan and Michael. At the conclusion of the arguments on September 20, the court denied plaintiffs' motion and ordered an evidentiary hearing into the circumstances under which copies of plaintiffs' purported answers to Touche Ross' interrogatories were served on September 5.

The hearing ordered by Judge Owen was held before him on November 4, 13 and 14. The evidence adduced included the testimony of Bader, Sands and Bader's secretary, Mrs. Blacker. In a comprehensive opinion dated January 9, 1976, Judge Owen found that the answers of Fagan and Michael concededly had not been received on September 5; that the answers of Randolph had not been received on September 5; and that there was "no credible evidence" that the answers of IIPL were timely executed and served. The judge therefore ordered that the action as against Touche Ross be dismissed with prejudice and that IIPL and Bader pay to Touche Ross the latter's ex-

penses, including attorneys' fees, in connection with the Rule 37 proceedings.

In support of the Rule 37 sanctions imposed, Judge Owen reached the following critical conclusion:

> "On the entire record before me, it is clear and I cannot but conclude that Mr. Bader intended the Rosenman firm [counsel for Touche Ross] to believe that the various answers to interrogatories were due and timely served on the very last day for such service, September 5, 1974, when in fact they had not been. I also cannot but conclude that thereafter Messrs. Bader and Sands made *false statements* and gave *false testimony* pursuant to an evolving plan to first deceive counsel and later the Court as to the circumstances surrounding the mailing of the purported 'answers' to interrogatories on behalf of plaintiffs Independent Investor Protective League and Fagan, Michael and Randolph on September 5, 1974." (emphasis added) (footnote omitted).

III.

We turn directly to what we find to be the only issue on this appeal that warrants discussion: whether the district court abused its discretion in imposing the Rule 37 sanctions that it did against plaintiffs and their counsel under the circumstances of this case. We hold that it did not.

Rule 37(b)(2) and (d), pursuant to which sanctions were imposed here by the district court, in relevant part provides:

> "**(b) Failure to Comply with Order.**
>
> . . . .
>
> (2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> . . . .
>
> **(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraph . . . (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees,

caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

The above provisions of Rule 37, to the extent here applicable, are simple and straightforward. The essence of the district court's findings are that plaintiffs' answers to the Touche Ross interrogatories were not timely filed in obedience to the court's order entered after repeated directions to answer the interrogatories which had been outstanding for many months; and that plaintiffs' attorney and an officer of IIPL had made false statements and had given false testimony to deceive counsel for Touche Ross and the court regarding the timeliness of the service of plaintiffs' answers. The court therefore dismissed the action as against Touche Ross with prejudice and ordered IIPL and Bader to pay to Touche Ross the latter's expenses, including attorneys fees, caused by such conduct. The court specifically declined to find, within the meaning of Rule 37, that the failure to comply with the court's order was "substantially justified or that other circumstances make an award of expenses unjust."

We hold that the district court acted well within its discretion under the circumstances of this case. In view of the clarity of the Rule 37 provisions for sanctions, their obvious purpose and the pervasive findings of the district court which we find to be more than adequately supported by the record, we find it unnecessary to dilate upon our conclusion. We do note, however, that in the most recent Supreme Court decision dealing with Rule 37 sanctions the Court reversed the Third Circuit's dismissal of the district court's dismissal of an antitrust action for failure to serve timely answers to written interrogatories, and in so doing stated:

"The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." (citations omitted) *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

Here we hold that the district court did not abuse its discretion.

We have carefully considered appellants' other claims and we find them to be without merit.[5]

Affirmed.

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5 We have limited our ruling to the narrow issue stated at the beginning of this opinion. In so doing, however, we do not put our imprimatur on the behavior of counsel *on either side* in the conduct of discovery proceedings as disclosed by the record before us. The conduct of appellants' counsel was utterly intolerable and reprehensible. The findings of the district court and our affirmance of the district court's exercise of discretion speak for themselves.

This however is not to be taken as approbation on our part of the conduct of appellee's counsel (referring to counsel other than the one who argued before us on this appeal). It is apparent that the delay of a few days in ascertaining the dates of purchases, the number of shares purchased and the price per share paid was of no moment in the instant action, especially where, as we were told at oral argument, discovery is still going on in the consolidated action after the elapse of three years. It also must have been obvious to appellee's counsel that, even if he succeeded in obtaining the extreme relief of dismissal of the instant action, this would avail his client very little in view of the pendency of the consolidated class action, in which the plaintiffs in the instant action can still participate in any recovery obtained for the benefit of the class.

None of us on this panel is so far removed in time from the practice of law that we fail to recognize that there probably will never be a perfect pretrial discovery proceeding, any more than a perfect trial or a perfect tender offer. See *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969). Nevertheless, a personal feud between counsel does not justify the inordinate expenditure of time and money on the part of counsel and the parties as reflected by this record—to say nothing of the enormous imposition on the time of a busy district court and an appellate court that has now had two rounds of this proceeding.

We think that both the district court and ours deserve better of counsel *on both sides.*

APPENDIX G

AFFIDAVIT OF G. DIXON MAHON SWORN TO JANUARY 11, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY LEWIS, etc.

Plaintiffs

vs.

TELEPROMPTER CORPORATION, et al.

Defendants.

Civil Action
73 Civil 3929 VLB

[Assigned to Hon. Richard Owen USDJ]

STATE OF TEXAS
ss:
COUNTY OF CROCKETT

G. DIXON MAHON, being duly sworn, deposes and says:

I am one of the plaintiffs in constituent action 73 Civil 4133 [by reason of my membership in the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE]. I am a member of the Bar of the State of Texas and the District Attorney of the City of Ozona Texas.

It has now been brought to my attention that HON. RICHARD OWEN, the District Judge presiding over

Appendix G

constituent action 73 Civil 4133 was personally known to LAWRENCE R. ENO, the attorney for the defendant TOUCHE ROSS & COMPANY and that this was not communicated by him to my attorneys until the information was discovered otherwise.

I have been informed that the acquaintance between Judge Owen and LAWRENCE R. ENO is as follows:

1. That Judge Owen was interviewed by the Judiciary Committee of the Association of the Bar of the City of New York with respect to his qualifications for the Federal Bench and that LAWRENCE R. ENO was a member of this Committee. The interview took place only a short time prior to the application made by Mr. Eno for Rule 37 sanctions against the plaintiffs in constituent action 73 Civil 4133. Judge Owen was appointed to the Federal Bench in December 1973 and the motion involved was made on September 20th, 1974.

2. That Judge Owen and LAWRENCE R. ENO met twice at the opera and once at a social function.

Based on my understanding of the Canons of Ethics these facts should have been revealed by Mr. Eno to my attorneys prior to the argument of the application involved before Judge Owen. I further believe that the above facts warrant the District Judge to recuse himself pursuant to 28 USC 455. Had these facts been known to me at the time of the making of the application involved I would have instructed my attorneys to request the District Judge to recuse himself in the matter.

s/ G. Dixon Mahon
G. Dixon Mahon

Sworn to before me this 11th day of January 1977
s/ (illegible)

APPENDIX H

RELEVANT STATUTORY, CONSTITUTIONAL AND REGULATIONS INVOLVED

United States Constitution, Amend. 5

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amend. 6

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Federal Rules of Civil Procedure, Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to

at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the

United States or any agency or officer thereof to be brought into the action as a defendant.

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

Rule 33. Interrogatories to Parties

"(a) AVAILABILITY; PROCEDURES FOR USE. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Appendix H

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) SCOPE; USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

Appendix H

(c) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine audit or inspect such records and to make copies, computation, abstracts or summaries."

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 37. Failure to Make Discovery: Sanctions

"(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An

application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated

claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to

pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories

submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) SUBPOENA OF PERSONS IN FOREIGN COUNTRY. A subpoena may be issued as provided in Title 28, U.S.C., §1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule."

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

Rule 41. Dismissal of Actions

"(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff: by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the

service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order."

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.)

Federal Rules of Evidence, Rule 605. Competency of Judge as Witness

"The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934.)

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-261

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL, MICHAEL FAGAN and I. WALTON BADER,

Petitioners,

vs.

TOUCHE ROSS & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION

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Of Counsel

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MEMORANDUM OF RESPONDENT IN OPPOSITION

The question before the Court of Appeals (Moore, Friendly and Timbers, JJ.) was whether the District Court had abused its discretion in this class action in dismissing petitioners' complaint under Fed. R. Civ. P. 37(b) and (d) as to respondent Touche Ross & Co. ("Touche Ross")*

* The petition (*e.g.*, pp. 1, 13) is in error in stating simply that the District Court dismissed the complaint. The dismissal as to Touche Ross left unaffected plaintiffs' claims as to the other defendants. The appeal was taken on a certification pursuant to Fed. R. Civ. P. 54(b) (Pet. 29a). Touche Ross also remains liable in a consolidated action to respond to the claims of other members of the class (JA 605-10).

References designated "Pet." refer to pages of the petition for certiorari and those designated "JA" to pages of the Joint Appendix in the Court of Appeals.

and awarding it attorneys' fees on the basis of a record showing complete and deceitful failure to comply with Court orders. *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976).

The Courts below found (Pet. 4a *et seq.*, 27a *et seq.*) that there had been an inexcusable failure to respond to a few simple interrogatories for a period of about ten months, a deliberate ignoring of the directions of the District Court to respond thereto, a failure to comply with an order entered under Fed. R. Civ. P. 37(a) directing such response, and a calculated effort to mislead the Court and counsel by a "concocted story" and "false statements and . . . false testimony" as to whether there had been compliance with such order. These abuses were characterized by the Court of Appeals as "utterly intolerable and reprehensible" (Pet. 37a, ftn. 5).

The Court of Appeals found that "the pervasive findings of the district court . . . [were] more than adequately supported by the record" (Pet. 36a) and held that "the district court acted well within its discretion under the particular circumstances of this case" (Pet. 28a, 36a). A petition for a rehearing containing a suggestion that the action be reheard *en banc* was denied by the Court of Appeals, which noted that "no active judge or judge who was a member of the panel [had] requested that a vote be taken on said suggestion."*

The petition is replete with misstatements of fact. Although the petition asserts that the purported facts it sets

* A copy of the order of the Court of Appeals is annexed hereto as Appendix A.

forth are "uncontroverted" or "undisputed" (*e.g.* Pet. 10), many of them are not only "controverted" but are contrary to fact, as the opinions of the District Court (Pet. 4a *et seq.*) and Court of Appeals (Pet. 27a *et seq.*) show. The boldness with which statements are made which are directly contradicted by the record is a continuation of what the Court of Appeals called "the genius for confusion which [petitioners'] counsel has demonstrated throughout" (Pet. 30a, ftn. 3).

The disingenuousness of the petition is demonstrated by the facts that in the District Court petitioners' attorney claimed that certain alleged copies of purported "answers" to interrogatories had been "inadvertently" mailed and that he had had nothing to do with the mailing (Pet. 4a *et seq.*); that the Court found that petitioners' counsel had himself deliberately mailed them to create the belief that there had been compliance with the Court order, when there had not been, and had then presented a "concocted story" through false statements and testimony to conceal the fact (*id.*); and now, in this Court, the petition (pp. 28-29) suggests that petitioners' counsel deliberately mailed the alleged copies* but had no alternative because otherwise it would have been apparent that petitioners were in noncompliance with the Court order. So manifold are the deceptive misstatements in the petition that it would take a brief of inordinate length to set the record straight. We do not deem such imposition on this Court to be necessary.

* The statements in the petition (pp. 3, 5, 17, 28) that it is "conceded" and "undisputed" that those alleged copies "were entirely correct" and "gave the adverse party all of the information that it required", are incorrect. Not only was such not conceded, but it is contrary to fact (JA 477-86, 550, 544, 573-76).

Indeed, the petition is so inaccurate, confused and prolix, and the points it makes and the authorities it cites so irrelevant and misconstrued, as to warrant its denial pursuant to Rule 23(4) of this Court.

The decision of the Court of Appeals does not present any novel or important question of legal principle warranting review by this Court. It involves no substantial question of construction of federal or state law. It involves merely the application of settled principle to the facts of this case. None of the considerations governing review on certiorari set forth in Rule 19 of this Court is present here.

The opinions below (Pet. 4a *et seq.*, 27a *et seq.*) show willfulness, bad faith and fault. There was here no "inability" to comply due to circumstances beyond petitioners' control [see *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958)]; rather, there was not only a willful violation of a Court order under deceitful circumstances, but a record showing a complete and calculated indifference from the start to petitioners' responsibilities as litigants under the Rules of the Court (Pet. 27a *et seq.*, 4a *et seq.*). Consideration of the "full record" (*National Hockey League* v. *Met. Hockey Club, supra,* at 641-42) abundantly supports the conclusion of the Court of Appeals.

As to the various points urged by petitioners, the Court of Appeals stated that it had "carefully considered appellants' other claims and we find them to be without merit" (Pet. 37a); and we believe that is clearly apparent.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD WALPIN
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J. KELLEY NEVLING, JR.
ROSENMAN COLIN FREUND LEWIS & COHEN
Of Counsel

Appendix A

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-eight.

77-7187

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected & in behalf of the classes involved herein, *et. al.*

Plaintiffs

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, *et. al.*
Plaintiffs-Appellants

v.

TELEPROMPTER CORPORATION, TOUCHE, ROSS & COMPANY, HERBERT SCHLAFLY, *et. al.*

Defendants

TOUCHE, ROSS & COMPANY,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge

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